Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1997

Dale L. Epland, as Personal Representative
of the Estate of Glennie I. Epland, decedent,

Petitioner,

v.

Lumbermen's Mutual Casualty Company,
Reserve Life Insurance Company,
and National Financial Insurance Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the decision of the State Supreme Court "state action" impairing the obligation of contract under the U.S. Constitution Article 1, Paragraph 10 and depriving persons of property without due process of law under the U.S. Constitution Fourteenth Amendment, Paragraph 1?

2. Has state court decided an important question of federal law that has not been, but should be settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court?

3. Is the evidence constitutionally sufficient to support judgment for respondent?

4. Is there a substantial federal question?

LIST OF PARTIES

All Parties to this Petition are listed in the caption, except:

Meade Insurance Agency Associates, Inc. and William D. Meade who settled in August, 1995 and were dismissed; and

Continental Casualty Company, Medico Life Insurance Company, and Wisconsin Insurance World, Ltd. who were dismissed on 7/28/94

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Dale L. Epland as Personal Representative of the Estate of Glennie I. Epland, Decedent, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Minnesota.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Minnesota is reported at 564 NW2d, 203. The opinion of the Court of Appeals of the State of Minnesota is reported at 545 NW2d, 401. Two opinions of the court of first instance, District Court of Hennepin County, Minnesota are unreported.

JURISDICTION

The Supreme Court of the State of Minnesota entered its judgment on April 10, 1997. Petitioner's motion for rehearing was denied May 12, 1997. The jurisdiction of this Court is invoked under 28USC sec. 1257 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution
Article 1, Section 10

> No state shall make or enter into any treaty, alliance or confederation; grant letter of marque and reprisal; emit bills of credit, make anything but gold and silver coin a tender for payment of debts; pass any bill of attainder, ex post facto law, or law impairing obligation of contracts.

Fourteenth Amendment, Paragraph 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Hon. Harvey C. Ginsberg, court of first instance allowed amended complaint and ruled July 28, 1994:

> It is a question of fact whether a change in the primary responsible insurer is a modification of the fundamental terms of the contract requiring consent of the parties.

Hon. Thomas H. Carey, another judge of the first instance granted summary judgment on March 23, 1995:

> An obligor on a contract is free to enter into contracts with third parties whereby the third party agrees to perform for the obligor the duties the obligor is required by the main contract to perform. Such an arrangement, subject to exceptions not applicable in this instance can occur without the permission of the obligee.

For Minnesota Court of Appeals on April 2, 1991 in 545 NW 2d 401, Judge Mansur ruled:

> A sale of insurance policies between insurance companies that is intended to divest the previous insurer of all liability is an assumption agreement and a novation requiring consent of the insured.

The Supreme Court of Minnesota, Hon. Sandra Gardebring, on April 10, 1997 ruled:

> We hold that as a matter of law, the Eplands consented to the Lumbermens/Reserve assumption agreement by payment of premiums to Reserve, thus releasing Lumbermen's from its obligation under the policy.
>
> "The consent of Eplands was not necessary to effectuate the assumption, but only to relieve the first insurer from liability under the contract."

The Minnesota Supreme Court ruling was a surprise. Even though the Minnesota Supreme Court's holding appeared to be "state action", no authority was discovered until July 27, 1997:

> Application by state courts of a rule of law whether statutory or not in a civil action is "state action" under the Fourteenth Amendment. New York Times v. Sullivan, 376 U.S. 254, 265

which outlined invalid restrictions on constitutional rights under the Fourteenth Amendment to the United States Constitution.

Letter requesting Federal Question is being delivered to the Minnesota Court pointing out that Hartford Fire Insurance Co. v. California, 509 U.S. 764 113 S.Ct. 2891 125 Led 2d 612 (1993) and St. Paul Fire & Marine Ins. Co. v. Barry, 438

U.S. 531, 98 S.Ct. 2923 (1978) were in a brief to the Court. Diversity of citizenship existed from settlement with Meade in 1995.

BACKGROUND

Respondent Lumbermens in 1978 marketed a group of "Senior Security Policies" aimed at persons over 65 years. In 1979 the Eplands purchased a hospital indemnity policy adding a nursing home rider in 1981. From 1979 through 1987 Lumbermens was paid premiums timely as instructed to various payees (Marquette Agency, Kemper, etc.). In 1987 Lumbermens transferred the entire block of policies to Reserve on or about August, 1987. The Eplands were informed October 26, 1987, after the transfer, by Reserve with a statement "Subsequent premium payments made to Reserve Life Insurance Co. shall release Lumbermens Mutual Casualty Company for any and all liability under the Policy to you. . ." Lumbermens never contacted Eplands. Eplands paid Reserve until 1990, when they were informed by National that their policy had been transferred at July 31, 1990. Reserve did not inform Eplands it had gone out of business in Minnesota on May 31, 1990 nor that National was not licensed to do business in Minnesota, nor that National was technically insolvent in the year of transfer.

The Lumbermens guaranteed renewable policy was a prized asset of Mr. Epland. However, after the transfer to National the Eplands, on advice of National/Reserve, deposited $1996.10 with the former regional manager of Reserve, William Meade, who made efforts to secure other insurance from CNA and Medico and in February, 1991 instructed Eplands in two letters not to pay "Lumbermens or National Financial" premium. Bernie Epland called National at least once in February, 1991 writing down the monthly premium required to keep his policy in force. The content of

the phone calls has never been discovered due to the summary judgment. Bernie Epland died April 23, 1991 and the policy (though funds were on deposit with Meade) remained unpaid. Mrs. Epland, distraught and ill, continued to believe she had "Lumbermens" nursing home insurance.

This action was begun in Henn. Co. District Ct. Nov. 19, 1993. Meade for his actions in the Epland matter was sanctioned by the Minn. Dept. of Insurance and later settled in this action and was dismissed as a defendant.

REASONS FOR GRANTING THE WRIT

The decision of the State Supreme Court is "state action" requiring the Fourteenth Amendment of the United States Constitution protection of Eplands' property. State court decision conflicts with U.S. Supreme Court decisions and impairs the Epland insurance contract.

DIRECT AND CONCISE ARGUMENT AMPLIFYING REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

A. Rule 10c. A state court has decided an important question of federal law that has not been, but should be settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this court.

The Minnesota Supreme Court may not have been aware of Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S. Ct. 2891, 2914. The "primary policies are . . . the bases of the losses that are shared in the reinsurance agreements". . . see also . . .Gurley, Regulation of

Reinsurance in the United States, 19 Forum 72,73 (1983). The Court continues:

> Indeed reinsurance is so closely tied to the terms of the primary insurance contract that one of the two categories of reinsurance (assumption reinsurance) substitutes the reinsurer for the primary or "ceding" insurer and places the reinsurer into contractual privity with the primary insurance policyholders. See id. at 73-74; Colonial American Life Ins. Co. v. Commissioner, 491 U.S. 244, 247, 109 S.Ct. 2408, 2411, 105 Led 2d 199 (1989).

Mr. Gurley in his article goes on to say at p.74:

> "Assumption reinsurance is a novation agreement in which privity is created between the insurer and the ceding company's policyholders and is evidenced by the reinsurer issuing assumption certificates. Assumption reinsurance requires acceptance by the policyholders."

See also Lovell v. St. Louis Mutual Life Insurance Company, 111 U.S. 264. When a life insurance company has terminated its business and transferred its assets and policies to another company, the insured is authorized to treat the contract at an end and sue to recover his premiums.

Minnesota Supreme Court on April 10, 1997 states:

"the consent of Eplands was not necessary to the assumption."

B. Constitutional Scrutiny

1. Is the decision of the state Supreme Court "state "action" impairing the obligation of contract, Article 1 section 10 and depriving persons of property without due process of law under Fourteenth Amendment of the United States Constitution?

Application by state courts of a "rule of law", whether statutory or not, to award a judgment in a civil action between private parties is "state action" under the Fourteenth Amendment. New York Times v. Sullivan, 376 U.S. 254, 265.

The Minnesota Supreme Court:

> We hold that as a matter of law, the Eplands consented to the Lumbermens/Reserve assumption agreement by payment of premiums to Reserve, thus relieving Lumbermen's from its obligation under the policy."

The state court has applied a state rule of law imposing invalid restrictions on Eplands' constitutional rights of contract obligations and of their property in the insurance contracts.

> It matters not that the law has been applied in a civil action and that it is common law only. The test is not the form in which state power has been applied, but whatever the form whether that power has in fact been exercised. New York Times v. Sullivan, supra. citing Ex parte Virginia, 100 U.S. 339, 346-347. American Federation of Labor v. Swing, 312 U.S. 321.

2. Is the evidence constitutionally insufficient to support the judgment for the respondent?

Epland had no opportunity to depose witnesses. The only deposition noticed was to Lehmann Brothers to appear with records of the Lumbermens/Reserve transaction on April 3, 1995. Summary judgment of March 23, 1995 gave Lumbermens the opportunity to have the deposition cancelled. No witnesses appeared against Epland except by affidavit without opportunity to cross-examine.

Also see New York Times v. Sullivan., supra. pp. 285-292.

SUBSTANTIAL FEDERAL QUESTION

The case cries for review. In a March 28, 1994, New York Times article, "Transfers by Insurers Under Fire. Controls are Sought on Trading of Policies," p. C1 by Michael Quint:

> "Mrs. Epland, who is now 84, has not collected a dime from the insurance policy she and her husband who died in 1991, carried for more than a decade. . . . Mrs. Epland is not alone. Transfers between insurance companies of life and other long-term policies for disability are common. Many companies sell when they want to leave a particular line of business or for tax reasons.
>
> "But the hardship on tens of thousands of people like the Eplands, who have seen their policies transferred from strong to weak companies. . . ."

The country is deluged with insurance companies changing their contractual relationship and regulatory

environment. In Epland the assumption reinsurer is not licensed in Minnesota. Massachusetts reinsurer Emlico moved to Bermuda. Not only elderly policyholders but also huge corporations are finding their insurance coverage transferred. LaFarge, et al. v. Penna. Insurance Dept., 690 A2d 826.

Professor Joseph Belth in the Insurance Forum, October 1989, p. 63, Ellettsville, IN has perhaps best summed up the dilemma of the small policyholder:

> Dear Creditor,
>
> Effective immediately my obligations to you have been assumed by James W. Honorbound, Ellettsville, IN. Jim is a fine fellow; you'll like him.
>
> To anticipate your question you have no recourse to me in the event Mr. Honorbound's bankruptcy or failure to meet his obligations to you.
>
> Very truly Yours,
> Joseph M. Belth

Senator Howard Metzenbaum refers to the plight of the small policyholders and their option for legal redress in his speech of April 1994 in support of the Metzenbaum/Bryan "Insurance Policy Transfer Act" delivered on the Senate Floor (See Appendix G):

> "In most cases even when it's possible to sue, it's impractical. Many lawyers are reluctant to make a case against a well-funded insurance company . . . Lawyers that will take a policyholder's case, usually require thousands of dollars in legal fees in advance. Few policyholders have that kind of money to gamble on a lawsuit."

Reserve and National on July 21, 1997 settled with the Ida Vraa Estate on another nursing home policy for $40,000. Estate of Vraa v. Reserve Life Insurance Company and National Financial Insurance Co., United States District Court, District of Minnesota, Case No. 6-96-350, Magistrate Judge Arthur Boylan, presiding. Lumbermens had been dismissed because of the Epland decision at issue here.

CONCLUSION

For constitutional reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 8, 1997

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Findings of Fact, Conclusion of Law, and Order for Summary Judgment as to Defendants Lumbermens' Mutual Ins. Co., Reserve Life Ins. Co., and National Financial Ins. Co., Only, of the State of Minnesota District Court, County of Hennepin, Fourth Judicial District B-1

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STATE OF MINNESOTA **COUNTY OF HENNEPIN**	**DISTRICT COURT** **FOURTH JUDICIAL DISTRICT**

Glennie I. Epland, and Dale L. Epland, her attorney in fact,	**Court File #93-19775**
Plaintiffs, -vs-	**FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER**
Meade Insurance Agency Associates, Inc. William D. Meade, Lumbermen's Mutual Casualty Company, Reserve Life Insurance Company, National Financial Insurance Company, Medico Life Insurance Company, Medco Life Insurance Company, Wisconsin Insurance World, Ltd., and Continental Casualty Company, Defendants.	

The above-entitled matter came before the Honorable Harvey C. Ginsberg on June 22, 1994. Plaintiffs brought a motion to amend their complaint. James B. Lund, Esq., and Richard H. McGuire, Esq., appeared on behalf of the Plaintiffs. Allan J. Zlimen, Esq., appeared on behalf of Defendants Meade Insurance and William Meade. James R. Gray, Esq., appeared on behalf of Lumbermen's Mutual Casualty, Reserve Life Insurance Company, and National Financial Insurance Company. Plaintiffs dismissed from this action with prejudice and without costs Defendants Continental Casualty Company, Medico Life Insurance

Company, improperly identified as Medco Life Insurance Company, and Wisconsin Insurance World, Ltd. Based upon the briefs, record, and proceedings herein this court issues the following:

ORDER

1. Plaintiff's motion to amend is granted in part.
2. The Memorandum of Law attached herein is incorporated by reference.

By The Court

Dated: 7/28/94

s/s
Judge Harvey C. Ginsberg

FACTS

In 1979, Plaintiffs Glennie Epland and her now-deceased husband, Bernie Epland ("Eplands" herein) purchased a hospital indemnity policy from Lumbermen's Mutual Casualty Company which included an optional rider for skilled nursing home benefits. Lumberman's had no right to cancel, refuse to renew, or place any restrictive riders on the policy.

On November 1, 1987 said policy was assumed by Reserve Life Insurance Company of Dallas, Texas. In February of 1990, the Eplands allegedly paid a premium of $1178.00 to Reserve. Effective July 1, 1990 said insurance policy was further assumed by National Financial Insurance Company, based in Waco, Texas. Plaintiffs claim that National Financial Insurance Company has been assigned some of the lowest financial ratings by the A.M. Best and other respected financial insurance reporting agencies.

After July 1990, the Eplands contacted National Financial to ascertain the name of an insurance agent and were given Defendant Meade's name. Through Meade, the Eplands claim they began to seek replacement nursing home care coverage to replace that of the original policy.

Defendants' (Lumberman's, Reserve, and National) position is that the Plaintiff's allowed the policy to lapse for non-payment of premium. However, Plaintiffs' position is that on both August 15, 1990 and on October 23, 1990 checks totaling $1996.10 were sent to Defendant Meade as premium payments.

MEMORANDUM OF LAW

Motion to Amend Complaint

Leave to amend shall be freely granted when justice so requires. Gunnufson v. Onan Corp., 450 N.W.2d 179, 181

(Minn. Ct. App. 1990). However, a motion to amend is properly denied where the amendment would serve no purpose. Taubman v. Prospect Drilling & Saving, Inc., 469 N.W. 335, 338 (Minn. Ct. App. 1989). Other factors the court may consider in deciding whether an amendment should be allowed include (1) the stage of the proceedings, Tomlinson Lumber Sales, Inc., v. J.D. Harrold Co., 263 Minn. 470, 475, 117 N.W.2d 203, 207 (1962); and (2) whether substantial delay will result. Hughes v. Micka, 269 Minn. 268, 275, 130 N.W.2d 505, 510 (1964).

A motion to amend should be denied only when prejudice may result or the amendment would serve no legal purpose. Lumbermen's Underwriting Alliance v. Tifco, Inc., 465 N.W.2d 580 (Minn. Ct. App. 1991)(citing Pischke v. Kellen, 385 N.W.2d 201 (Minn. Ct. App. 1986)). In the instant case, no prejudice results to the Defendants. The original action was filed in November of 1993. Discovery has not been completed. Plaintiff has served no interrogatories or requests for production of documents on defendant Meade. Meade has not yet begun discovery on Plaintiff. No depositions have been scheduled or taken.

According to, 1 Herr and Haydock, Minnesota Practice Rules of Civil Procedure Annotated, ¤ 15.01 (1985)(the provision for amendment of pleadings) Minnesota follows the liberal practice developed under code practice and encourages the resolution of disputes on the merits rather than upon the formalities of pleadings. The parties opposing the amendment must establish prejudice. Id. Since no prejudice has been shown, leave to amend the complaint will not be denied on this ground.

The second issue is whether the amendment would serve any legal purpose. Unless the proposed amended complaint sets forth a legally recognized cause of action, the motion to amend should be denied. See Pische, 383 N.W.2d at 204. For clarity, this issue will be addressed separately under the

disputed Counts I, II, III, VIII, and IV of the Plaintiff's proposed complaint.

Count I addresses whether Lumbermen's made an improper "assignment" of the Hospital Indemnity Policy and nursing care rider to other insurance companies without Plaintiff's consent in contravention of basic contract law principles. An insurance policy is a contract and is analyzed under general principles of contract law. United States v. National Insurance Underwriters, 266 F.Supp. 636, 638 (D. Minn. 1967). The provisions of an insurance policy are to be interpreted according to plain, ordinary sense so as to effectuate the intention of the parties. The policy should by construed as a whole with all doubts concerning the meaning of language employed to be reserved in favor of the insured. Bobich v. Oja, 258 Minn. 287, 104 N.W.2d 19 (1960).

There is no dispute that the rights and obligations under the original policy were assumed from Lumbermen's by Reserve Life Insurance Company and were later assumed by National Financial Insurance Company. It is Lumbermen's, Reserve, and National position that those assumptions do not give rise to a legal basis for any liability to Plaintiffs since the assumptions did not modify any terms or conditions of the original policy.

However, when a basic element of the contract, in this case the parties to the contract, changes, the contract has indeed been modified. "No abrogation, change, modification, or substitution in a primary contract can be effected by the sole action of one of the parties to it. The consent of both is required to cancel, alter, or supplant a contract fairly made." The same meeting of the minds is needed that was necessary to make the contract in the first place. 17A Am. Jur. 2d section 513 (1991). See also Sturm v. Boker, 150 U.S. 312, 37 L. Ed. 1093, 14 S. Ct. 99; Wheeler v. New Brunswick & C.R. Co., 115 U.S. 29, 29 L. Ed. 341, 5 S.Ct. 1061.

It is a question of fact whether a change in the primarily responsible insurer is a modification of the fundamental terms of the policy requiring consent of the parties. Especially, such as in this case, where (1) Defendant National has allegedly been assigned low financial ratings by A.M. Best which raises a question of potential insolvency and (2) the original policy provided for guaranteed coverage. Therefore, count I can be properly amended.

Counts II and III address whether Defendants made fraudulent or negligent misrepresentations. The elements of misrepresentation are: (1) There must be a representation; (2) The representation must be false; (3) It must have to do with a past or present fact; (4) The fact must be material; (5) The fact must be susceptible of knowledge; (6) The representer must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true; (7) The representer must intend to induce the other person to act; (8) The other person is induced to act; (9) The person's actions must be in reliance upon the representation; and (10) The person is damaged as a result of the representation. Davis v. ReTrac Mfg., 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967).

It is a factual determination whether the facts of this case support the required elements of misrepresentation. First, a factual issue exists whether a change in the insurer primarily liable on the policy is a misrepresentation. Refer to the analysis and authority cited under Count I.

Second, Plaintiff must show a causal connection between the alleged misrepresentation and any damages the Plaintiff may have suffered. As previously stated, a factual issue exists as to whether National is financially stable. Thus, Counts II and III are properly amended.

Amendment is proper for each of the above claims. However, whether a contract was violated is separate from the issue of damages resulting from a violation. This order does

not speculate as to the damage component of any of Plaintiff's claims.

Count VIII addresses whether there has been a violation of Minnesota statute section 60A.17 and Minnesota Rule 2795.1300. Plaintiff now agrees that Count VIII in the Amended Complaint shall be stricken deferring to the Defendant's analysis of Minnesota Rule 2795.1300 and the Statutes associated therewith.

Count IX addresses whether Defendant Meade breached an alleged fiduciary duty. At common law, an insurance agent's duty to offer, advise, or furnish insurance coverage to an insured may arise from special circumstances surrounding the relationship. Johnson v. Urie, 405 N.W.2d 887, 889 (Minn. 1987). "One who undertakes...to render services to another which he should recognize as necessary for the protection of the other's person..., is subject to liability...resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of harm, or (b) the harm is suffered because of the others reliance upon the undertaking." Campbell v. Insurance Service Agency, 424 N.W.2d 785 Minn. Ct. App. 1988)(quoting Restatement (Second) of Torts section 323 Negligent Performance of Undertaking to Render Services (1965)).

Under Minnesota law, "[a] fiduciary relationship exists 'when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.'" Minnesota Timber Producers Associations, Inc. v. American Mutual Ins. Co. of Boston, 766 F.2d 1261 (1985)(quoting Toombs v. Daniels, 361 N.W.2d 801, 809 (Minn. 1985); Stark v. Equitable Life Assurance Society, 205 Minn. 138, 285 N.W. 466, 470 (1939)). Factors such as disparity in business experience and greater access to facts and legal resources may give rise to a

fiduciary relationship, if they are combined with a confidential relationship. Minnesota Timber Producers, 781 F.2d at 1267.

The existence of a fiduciary relationship is a question of fact and normally for the jury. See Murphy v. Country House, Inc., 240 N.W.2d 507, 512 (Minn. 1976). In the instant case, Defendant Meade attempted to find replacement coverage, advised the Eplands not to pay their National Financial premium, and had extensive contact with the Eplands during late 1990 and early 1991 via phone, written notes, messages, and personal visits.

The trust and confidence that the Epland's reposed in Meade was substantial. Thus, a jury will have to determine whether Meade's actions elevated the Meade/Epland relationship to that of a fiduciary thereby holding Meade to the standard of care that a fiduciary owes. Therefore, Count IX is properly amended.

s/Harvey C. Ginsberg
7/28/94

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
File No. 93-19775

Glennie I. Epland and
Dale L. Epland, her attorney
in fact

Plaintiff

Type of Case: Agency
Insurance

vs. **AMENDED COMPLAINT**

Meade Insurance Agency Associates, Inc.
William D. Meade, Lumbermen's Mutual
Casualty insurance Company, Reserve Life
Insurance Company, National Financial
Insurance Company,

Defendants

Glennie I. Epland, by Dale L. Epland, her attorney in fact, aver and allege the following:

1. Plaintiffs Glennie Epland ("Glennie" herein) and her now-deceased husband, Bernie Epland ("Bernie" herein) have at all times pertinent to the facts of this case resided at 3925 Standish Avenue South, Minneapolis, Minnesota.

2. Plaintiff Glennie was born July 10, 1908 and her now-deceased husband, Bernie, was born December 23, 1907.

3. On February 20, 1979 the Eplands purchased a hospital indemnity policy #PX952139 from Lumbermen's Mutual Casualty Company with a nursing home facility rider attached. Effective February 20, 1981 a personal health amendment rider was attached to the policy.

4. In the early years of this policy the annual premium for said policies was slightly in excess of $500.00 per year.

5. This policy is part thereof and clearly on the face of the policy stated that it was guaranteed renewable for life subject to a right to change rates. The language of the policy states:

> "This policy is guaranteed renewable for life and may be continued in force by the timely payment of premiums during your lifetime. We shall not have the right to cancel or refuse to renew the policy or to place any restrictive riders on the policy. However, we do reserve the right to change the renewal premium due on and after each renewal date of your policy. Any such change will apply to policies with the same form number as this policy issued to residents of the state in which you reside. We will give you written notice of any such change in the premium rate not less than 31 days before the next renewal date of your policy."

6. On November 1, 1987 said policy was assumed by Reserve Life Insurance Company of Dallas, Texas.

7. In February of 1990 the Eplands renewed their policy with Reserve for one year by paying the premium of $1178.00.

8. Effective July 1, 1990 said insurance policy was further assumed by National Financial Insurance Company, an insurance company based in Waco, Texas and not authorized to do business in the State of Minnesota.

9. At some time after July, 1990, when said insurance policy was assumed by National Financial, the Eplands contacted National Financial to ascertain the name of an agent in the State of Minnesota and were given the name of Defendant Meade and the Meade Insurance Agency Associates. At all times pertinent hereto, Defendant Meade and Meade Insurance Agency Associates ("MIAA" herein) were agents for Defendants Lumbermen's Mutual Casualty Company per a letter from National Financial dated May 24, 1993 and information from the Minnesota Department of

Insurance; Reserve Life insurance Company; and National Financial Insurance Company.

10. The Eplands through their agent Meade began on August 15, 1990 to seek replacement nursing home care coverage to replace that in the policy herein.

11. Defendant Meade had his license to act as an insurance agent in the State of South Dakota suspended for one year beginning April 11, 1988 for violations of practices in the state of South Dakota, which violations consisted of taking premium application monies from a client and not forwarding those with the application to the prospective insurer.

12. Defendant Meade's license to act as an insurance agent in the States of Wisconsin and Minnesota was also suspended for a period of three months beginning February 17, 1989 until May 17, 1989 as a result of his failure to report to those States the suspension noted in the paragraph above.

13. Beginning in August of 1990 Meade undertook on behalf of the Eplands to find replacement nursing home and home health care insurance coverage on their behalf.

14. On August 15, 1990 and on October 23, 1990 the Eplands sent checks totaling $1,996.10 to Defendant Meade as premiums to be attached to an application for a long term care policy ("Nursing Home Facility Policy") to be sent to insurance company by the name of Medico which insurance company was no longer offering this type of policy to individuals over the age of 80.

15. Defendant Meade out of those funds sent $725.00 to Medico for a premium payment on a home health care policy and sent $701.42 of those funds to CNA Insurance Company with an application to procure again long term health care ("Nursing Home Care Policy") leaving $569.68 in his agency's account belonging to the Eplands.

16. At the time the Eplands made application to Lumbermen's Mutual casualty Company for their insurance in

1979, and in 1987 when Lumbermen's subsequently assigned their policy to Reserve Life Insurance Company, Lumbermen's was a company with assets of approximately $8 billion receiving the highest policy ratings from the A.M. Best Insurance Rating Service as well as other respected financial rating services.

17. In 1987 when the Lumbermen's policy was transferred to Reserve Life Insurance Company and in 1990 when Reserve subsequently transferred the policies to National Financial, Reserve was a company with assets of approximately $500 million with strong financial statements and also receiving one of the highest ratings from the A.M. Best Ratings Service as well other respected financial ratings services.

18. The Texas Department of Insurance conducted a detailed field audit of the National Financial Insurance Company at the end of their fiscal year December 31, 1990. This was the year during which Reserve Life Insurance purportedly assigned the Plaintiffs' policies to National Financial.

19. The result of the Texas Department of Insurance audit was to find that National Financial Life Insurance Company, an approximately $70 million insurance company, had committed numerous violations of Texas Insurance Law during the examination year of 1990. In addition, as a result of a large number of adjustments made by the Texas Department of Insurance to accounting transactions recorded during the year by National Financial the commission found that National Financial, at the end of 1990, had capital and surplus totaling a ($2,021,824.00), as opposed to the approximately $10 million of positive capital and surplus the company had reported. In addition, National Financial had been assigned some of the lowest ratings by A.M. Best and other respected insurance reporting agencies.

20. The Eplands purchased the insurance policy herein from Lumbermen's in 1979 in reliance upon the mutual promises made between the two parties in that contract, one of which was that the contract as stated on its face would be renewable for life subject only to increases in premium.

COUNT I

21. Defendant Lumbermen's sought in 1987 to unilaterally modify the contract by substituting new parties to the contract when they made the purported assignment of contract to Reserve Life Insurance Company.

22. This purported assignment and modification of the contract was made in contravention of basic contract law principles in that there was neither consent by both parties to the contract, nor consideration for this modification to the contract provided by Defendant Lumbermen's.

23. Lumbermen's by such attempted modification breached their contract with the Eplands and the Eplands were injured thereby.

24. In 1990 when Reserve Life Insurance allegedly assigned their insurance contract with the Eplands to National Life Insurance Company they did so in contravention of basic contract law principles in that this alleged further modification which attempted to substitute new parties to the contract unilaterally was completely without consent of both parties and without consideration on the part of Reserve Life Insurance.

25. Said alleged attempt to modify the contract was in contravention of basic contract law principles in that there was no consent by the parties nor consideration provided by Reserve Life Insurance and said attempted modification was a breach of the contract and resulted in injury to the Plaintiffs.

Wherefore, Plaintiff demands judgment against Defendants, Lumbermen's Mutual Casual Company and

Reserve Life Insurance Company for their breach of contract to Plaintiffs.

COUNT II

26. Plaintiff realleges Paragraphs 1 through 25 of the Complaint as it is if set out here in full.

27. Defendants Lumbermen's Mutual Casual Company's and Reserve Life Insurance Company's purported modifications of the contract, wherein they indicated that the parties to the contract had been changed, constituted a misrepresentation of the fact that the parties to the contract had not been changed as well as a misrepresentation of the law of contract with respect to such modifications.

28. Defendants Lumbermen's and Reserve made such misrepresentations regarding the alleged modifications to the contract with knowledge of decades of case law and fundamental contract law principles to the contrary.

29. Said misrepresentations were made for the purpose of inducing the Eplands to rely upon those misrepresentations and look to the assignee under the alleged modifications for payment under the policy and also to remit their payment obligations to the assignees under said alleged modifications.

30. Defendants Lumberman's and Reserve made those misrepresentations in deliberate disregard for the rights of the Eplands and with the intention of inducing their reliance thereon.

31. Plaintiff herein relied upon those misrepresentations and sent premium payments to Reserve Life Insurance subsequent to the 1987 assignment; and, the Eplands relied upon the 1990 assignment by converting their internal records to accommodate the premium payment of $1660 to National Financial. Further, the Eplands made calls to National Financial for information subsequent to being notified of the 1990 assignment.

32. The purported assignment of the insurance policy to a smaller company in 1987 and finally to a technically insolvent company in July of 1990 caused the Plaintiff herein to undertake to seek replacement coverage for said policy which actions have resulted in Plaintiff being uninsured at this time and expending their own funds for coverages that should have been in effect under the terms of the policy.

33. Plaintiff's reliance on the misrepresentations of Lumbermen's and Reserve caused the Eplands to get in contact with National Financial, which contact subsequently led to their involvement with Defendant Meade herein.

34. Defendants Lumbermen's and Reserve's misrepresentations to Plaintiff herein were fraudulent on the part of Defendants Lumbermen's and Reserve in that they knew that the alleged unilateral modifications to the contract which they had each made were not effective and they knew that there was no basis in contract law to support said alleged modifications.

35. Plaintiff did not become aware of the fraudulence of the alleged modifications until March of 1994.

Wherefore, Plaintiff demands judgment against Defendants Lumbermen's and Reserve Life Insurance Company for their fraudulent misrepresentations, both of fact and law, which they made to Eplands for the purpose of inducing their reliance thereon.

COUNT III

36. Plaintiff realleges Paragraphs 1 through 35 of the Complaint as if set out here in full.

37. Defendants Lumbermen's and Reserve Life insurance Company by stating to Plaintiffs herein that they were in 1987 and 1990, respectively, effecting a unilateral modification of the insurance contract did not exercise reasonable care or

competency in making such statements which were in clear contravention of basic contract law principles.

38. Plaintiffs justifiably relied upon the purported modification to the contract, and indicated this reliance by paying premiums to the respective assignees of these transactions.

39. Plaintiffs were subsequently damaged by Defendants' negligent misrepresentations as to the modification of the contract inasmuch as said negligent misrepresentations ultimately led to Plaintiffs association with Defendant Meade and the subsequent events which resulted in their loss of insurance coverage for expenses which they are now paying.

Wherefore, Plaintiff demands judgment against Defendants Lumberman's, Reserve, and National Financial for their negligent misrepresentations to Plaintiff.

COUNT IV

40. Plaintiff realleges Paragraphs 1 through 39 of the Complaint as if set out here in full.

41. Minnesota Statute 62A.48 requires that any evidence of insurance issued or delivered within the State of Minnesota must be done so by a qualified insurer and the policy must satisfy the requirements of Minnesota Statute 62A.46 to 62A.56.

42. National Financial was not an insurer qualified to do business in the State of Minnesota and therefore does not qualify under Minnesota Statute 62A.48.

43. That same Statute requires that such policy shall not be offered or delivered in the State of Minnesota until the insurer has received from the insured a written designation of at least one person, in addition to the insured, who is to receive notice of cancellation of the policy for non-payment of premium.

44. Defendants Lumbermen's, Reserve or National Financial did not ask for nor did they receive from the Eplands a name of an additional person who was to be notified of a cancellation for non-payment of premium.

Wherefore, Plaintiff demands that Defendants Lumbermen's, Reserve and National Financial be found in violation of Minnesota Statute 62A.48 and that Plaintiff's policy be reinstated upon payment of the premium.

COUNT V

45. Plaintiff realleges Paragraphs 1 through 44 of the Complaint as if set out here in full.

46. Minnesota Statute 325D.44 makes it a deceptive trade practice to "(3) cause likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by another; ... (5) represents the goods or services have sponsorship approval characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that the person does not have;"

47. Defendants Lumbermen's, Reserve and National Financial represented through their actions to the Plaintiffs that National Financial was an insurance company licensed or having authority to do business in the State of Minnesota, which representation was false.

Wherefore, Plaintiff demands judgment against Defendants Lumbermen's, Reserve and National Financial for Plaintiff's costs and attorneys fees for said deceptive trade practice as defined in Minnesota Statute.

COUNT VI

48. Minnesota Statute 325D.53 Subd. 1 (3) makes it illegal for two or more persons in concert to refuse to deal with another person.

49. Defendants Lumbermen's and Reserve being some of the largest providers of nursing home insurance coverage in the nation by their alleged modifications of the insurance contract effectively refused to deal with the Eplands in terms of providing nursing home insurance.

Wherefore, Plaintiff demands judgment against Defendants Lumbermen's and Reserve for violation of Minnesota Statute 325D.53 Subd. 1 (3) which statute allows for treable damages.

COUNT VII

50. Plaintiff realleges Paragraphs 1 through 49 of the Complaint as set out here in full.

51. Minnesota Statute 325F.71 allows a supplemental civil penalty against individuals found guilty of perpetrating deceptive trade practices against senior citizens, defined as 62 years of age or older, which category fits Plaintiffs herein, if found violating Minnesota Statute 325D.43 to 325D.48.

52. Defendants Lumbermen's, Reserve and National Financial actions in contravention of Minnesota Statute 325D.44 as set out above are also in violations of Minnesota Statute 325F.71 for which additional penalties of $10,000,00 for each violation are allowed as well as costs, disbursements including cost of investigation, and reasonable attorneys fees; and such other equitable relief as the Court deems just including costs incurred by the necessity of having Plaintiff's son leave his home in New York to tend to Plaintiff's affairs.

Wherefore, Plaintiff demands judgment against Defendants Lumbermen's, Reserve and National Financial pursuant to violations of Minnesota Statute 325F.71.

COUNT VIII

53. Plaintiff realleges Paragraphs 1 through 52 of the Complaint as if set out here in full.

54. Minnesota Rule 2795.1300, formerly Minnesota Statute 60A.17 at all times pertinent hereto, requires that insurance agents who hold funds of prospective insureds do so as a fiduciary and must give a client monthly statements detailing the amounts of those monies held in trust by the agent.

55. Between July of 1990 and August of 1991 Defendant Meade and Meade Insurance Agency held funds belonging to the Eplands during which period the Eplands were not supplied with monthly statements of account as required under Minnesota Statutes and Rules.

56. Failure to provide such accounting to Plaintiff has resulted in confusion and mental anguish to Plaintiff and has caused her to retain legal counsel to help sort out these financial matters.

Wherefore, Plaintiff demands judgment against Defendant Meade and MIAA for breach of their fiduciary duty with respect to the rules set out above and demand judgment for their costs associated therewith.

COUNT IX

57. Plaintiff realleges Paragraphs 1 through 56 of the Complaint as set out here in full.

58. Defendant Meade and Meade insurance Agency acted in a fiduciary capacity with respect to the Plaintiffs in

terms of advising them and procuring for them long-term health care coverage and nursing home coverage,

59. Between 1990 and 1991 Defendant Meade and Meade Insurance Agency, by his own choice and actions, had numerous contacts both in person, on the phone and via letter with the Eplands in which he sought their business and purported to advise them on insurance matters and work on their behalf in obtaining the insurance coverages which they requested. As a result of this relationship, the Eplands relied on Defendant Meade and Meade Insurance Agency's advice and counsel.

60. Meade breached his fiduciary duty to his clients, the Eplands, when he counseled them not to pay their premium on their expiring National Financial life policy even when Defendant Meade had spent the several prior months in attempting to procure alternate nursing home care insurance for the Plaintiffs and was unsuccessful in doing so.

61. Defendant Meade acting for Defendants Lumbermen's, Reserve, and National Financial, knew that the Eplands were, in 1990, at an age in excess of 80 years old and with pre-existing health problems that were going to make it extremely difficult to find alternate nursing home care coverage. Nevertheless, Meade counseled the Eplands to not renew their National Financial health coverage.

62. Meade breached his fiduciary duty to the Eplands by not making a quarterly payment to National Financial upon the expiration of that policy when he knew full well that the Eplands were not able, had been unable, and likely would continue to be unable, to obtain any alternate nursing home care insurance coverage.

Wherefore, Plaintiff demands judgment against Defendant Meade and Meade Insurance Agency for the breach of his fiduciary duty owed to them in his capacity as their insurance agent.

63. Plaintiff has been damaged by Defendants herein as set out in Counts 1 through 9 of this Complaint and seeks judgment against each of the Defendants in an amount in excess of $50,000.00 plus costs and attorneys fees as deemed appropriate, under the individual counts, by the Court.

s/s
James B. Lund, No. 65109
Attorney for Plaintiff
120 South 7th Street, Suite 910
Minneapolis, Mn. 55402
332-1200

s/s
Richard H. McGuire, No. 135094
Foshay Tower, Suite 811
821 Marquette Avenue
Minneapolis, Minnesota 55402
371-0661

The undersigned hereby acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. 549.21 Subd. 2, to the party against who the allegations in this pleading are asserted.

s/s
James B. Lund

s/s
Richard H. McGuire

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Glennie I. Epland and Dale L. Epland, her attorney in fact,	)	
Plaintiffs,	)	File No. CT 93-19775
v.	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, & ORDER FOR SUMMARY JUDGMENT AS TO DEFENDANTS LUMBERMENS' MUTUAL INS. CO., RESERVE LIFE INS. CO., AND NATIONAL FINANCIAL INS. CO., ONLY.**
Meade Insurance Agency Associates, Inc., William D. Meade, Lumbermens' Mutual Casualty Insurance Company, Reserve Life Insurance, Company National Financial Insurance Company,	)	
Defendants.	)	

The above-entitled matter came on for hearing before the Honorable Thomas H. Carey, Judge of District Court, on March 13, 1995, at the Hennepin County Government Center, Minneapolis, Minnesota.

Richard H. McGuire, Esq. and James B. Lund, Esq., appeared on behalf of the plaintiffs.

Gregory M. Weyandt, Esq., appeared on behalf of defendant Reserve Life Insurance Company.

John F. Beukema, Esq., appeared on behalf of defendant Lumbermens' Mutual Casualty Company.

FINDINGS OF FACT

In February of 1979 Bernie N. Epland purchased a hospital indemnity insurance policy covering himself and his wife Glennie from Lumbermens' Mutual Casualty Company. The policy contained a provision guaranteeing that it could be renewed for life, subject to the insurer's right to increase the premiums at the time of each renewal. In February of 1982, Mr. Epland purchased a rider to the policy that provided certain nursing home facility benefits. (Beukema Aff. exh. 1.)

In 1987, Lumbermens' withdrew from the business of offering individual accident and health insurance. Lumbermens' entered into an Assignment Agreement with Reserve Life Insurance Company, effective July 1, 1987, whereby Reserve assumed the accident and health insurance policies of Lumbermens' and agreed to perform Lumbermens' obligations under those policies. Regulatory approval for this transaction was obtained from all states under whose laws such approval was then required. At the time the Assumption Agreement was entered into Lumbermens' and Reserve both had an A+ rating from Best's. (Affidavit of Wendy J. Dobner.)

On October 26, 1987, Reserve sent the Eplands a letter informing them of the assumptions of their policies and guaranteeing "that all of the protection and benefits" of those policies "will remain intact," and providing them with a Certificate of Assumption. The Certificate informed the Eplands that "[s]subsequent premium payments made to Reserve Life Insurance Company shall release Lumbermens' Mutual Casualty Company from any and all liability under the Policy to you... (Beukema Aff. exh. 2.)

The Eplands received the Certificate of Assumption and did not object to the assumption of their policy by Reserve. In fact, the Eplands paid premiums to Reserve as the policy

came due for renewal in each of the next several years. (Beukema Aff. exhs. 3 and 4.)

In 1990, Reserve decided to withdraw from the business of offering the kind of insurance held by the Eplands and entered into an Assumption Reinsurance Agreement, effective August 31, 1990, with National Insurance Company. National agreed to assume responsibility for Reserve's obligations under all such policies then held by Reserve. A notice and Certificate of Assumption was then sent by National to the Eplands. (Beukema Aff. exh. 5.)

The Amended Complaint alleges that upon receiving notice of the assumption of his policy by National, Mr. Epland decided to seek another insurer who could provide coverage to replace the policy then held by National. The Eplands contacted an independent insurance agent, defendant William Meade, in order to find another insurer to provide replacement coverage. Mr. Meade was not then an agent of any of the defendants in this case. (Affidavit of William D. Meade.)

The renewal premium on the Eplands' policy came due in February 1991. The premium was not paid. A notice warning the Eplands that the policy would lapse if the premium was not paid was sent to the Eplands in late March of 1991. (Beukema Aff. exh 6.) The premium was not paid and the policy lapsed.

Mr. Epland died in April of 1991.

This action was commenced by Mrs. Epland and her son, Dale Epland, on November 19, 1993. Mrs. Epland died in October of 1994, and the action is being maintained by Dale Epland.

The defendants now move for summary judgment on all claims.

CONCLUSIONS OF LAW

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03.

The plaintiff claims that the Assumption Agreements amounted to a modification of the insurance contract to which his parents did not consent and therefore constitute breaches of contract by Lumbermens' and Reserve. The plaintiff also claims that Lumbermens' and Reserve committed fraud and negligent misrepresentation by impliedly representing that the assumptions were lawful.

Insurance policies are contracts, and unless there are statutory provisions to the contrary, the general rules of contract law apply. Waseca Mutual Ins. Co. v. Noska, 331 N.W.2d 917, 926 (Minn. 1983); Estes v. State Farm Fire & Casualty Co., 358 N.W.2d 123, 124 (Minn App. 1984). An obligor on a contract is free to enter into contracts with third parties whereby the third party agrees to perform for the obligor the duties the obligor is required by the main contract to perform. Such an arrangement, subject to exceptions not applicable in this instance, can occur without the permission of the obligee to whom the performance is owed. Restatement of Contracts 2d Sec. 318; 3 Williston, Contracts Secs. 865-66 (1951 and Supp. 1994); see also Minn. Stat. Sec. 336.2-210(l) (sale of goods) and Comment thereto, 21A Minn. Stat. Ann. ar 220 ("[I]t is not a breach to delegate performance of an non-personal duty, by subcontract or mere request, to a third party. . ." (Emphasis omitted.)). While such an arrangement relieves the original obligor of its duties only if the obligee agrees to the arrangement, the arrangement itself is legal and not a breach of the underlying contract.

The facts of this case are such that it is clear that the Eplands, by their own conduct, agreed to the substitution of obligors. In October of 1987 Reserve sent the Eplands a letter informing them of Reserve's assumption of their policies and provided them with a Certificate of Assumption. The Certificate specifically informed the Eplands that "[s]subsequent premium payments made to Reserve Life Insurance Company shall release Lumbermens Mutual Casualty Company from any and all liability under the Policy to you. . ." (Beukema Aff. exh. 2.) The Eplands did not object to the assumption of their policy by Reserve. In fact, the Eplands paid their renewal premiums to Reserve for several years.

In 1990, when Reserve entered into an assumption agreement with National Insurance Company a notice and Certificate of Assumption was then sent by National to the Eplands. (Beukema Aff. exh. 5.) Mr. Epland then decided to seek insurance with another insurer to replace the policy then held by National. When the premium on the policy held by National came due in February of 1991 it was not paid by Mr. Epland. The Eplands received notice of the possible lapse of the policy. (Beukema Aff. exh.6.) The premium was not paid and the policy lapsed.

It is clear that the assumption of the policy by Reserve was legal and that the Eplands agreed to it. The assumption of the policy by National was also legal and the Eplands chose not to pay the premium. (It was not alleged, nor is there law to support a claim that the "lifetime" guarantee in the original policy defeats the right of subsequent assumption of the non-personal contract.)

The Eplands terminated the contract by their own volition. Until the Eplands decided not to pay the premium they "had the benefit of their bargain," that is, if they had paid the premium their bills would have been paid by one, two or all of these insurance companies. The attorneys for the

plaintiff have turned over every conceivable judicial stone in search of a cause of action that avoids the failure to pay the premium, but there appears to be none. The failure to pay, as required by the contract, renders the other alleged issues moot.

Defendants' motion for summary judgment is granted.

ORDERED:

1. Defendants' motion for summary judgment on all counts of plaintiff's complaint is granted in favor of defendants Lumbermens' Mutual Insurance Company, Reserve Life Insurance Company, and National Financial Insurance Company, only.

2. A pre-trial/settlement conference of the remaining suit verses Meade Insurance Agency Associates inc., and William D. Meade is set for April 27, 1995, at 9:00 a.m.

BY THE COURT:

s/s
Thomas H. Carey
Judge of District Court

DATED: March 23,1995.

545 NW 2d. 401

STATE OF MINNESOTA

IN COURT OF APPEALS

C5-95-1519

Hennepin County
District Court File No. 9319775

Mansur, Judge*

Glennie I. Epland and Dale L. Epland, her attorney in fact,	Richard H. McGuire 811 Foshay Tower 821 Marquette Avenue.
Appellants,	Minneapolis, MN 55402
	James B. Lund 910 One Financial Plaza Minneapolis, MN 55402

vs.

Meade Insurance Agency Associates, Inc., et al.,	Allan J. Zlimen Suite 200 430 Oak Grove Street
Respondents,	Minneapolis, MN 55403
Lumbermen's Mutual Casualty Company,	John F. Beukema Faegre & Benson 2200 Norwest Center
Respondent,	90 South Seventh Street Minneapolis, MN 55402
Reserve Life Insurance Company,	Jeanne H. Unger Rider, Bennett, Egan & Arundel

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

Respondent,	2000 Metropolitan Centre 333 South Seventh Street Minneapolis, MN 55402
National Financial Insurance Company, Respondent.	James R. Gray Gilmore, Aafedt, Forde, Anderson & Gray Suite 3100 150 South Fifth Street Minneapolis, MN 55402

Filed April 2, 1996
Office of Appellate Courts

SYLLABUS

A sale of insurance policies between insurance companies that is intended to divest the previous insurer of all liability is an assumption agreement and a novation, requiring the consent of the insured.

Reversed.

Considered and decided by Parker, Presiding Judge, Schumacher, Judge, and Mansur, Judge.

OPINION

MANSUR, Judge

Glennie Epland, through her personal representative Dale Epland, appeals from the dismissal of her claims for reimbursement of nursing home care expenses, arguing the respondent insurance companies failed to get her consent for their sale of her insurance policy.

FACTS

In February 1979, Bernie and Glennie Epland purchased a hospital indemnity insurance policy with a nursing home rider from Lumbermen's Mutual Casualty Company (Lumbermen's). The Eplands paid annual premiums for this policy from 1979 until 1987.

In July 1987, Reserve Life Insurance Company (Reserve) acquired the Eplands' policy, along with many others, from Lumbermen's. On October 26, 1987, Reserve notified the Eplands that it had acquired their Lumbermen's policy. The notice stated that Reserve would "guarantee that all of the protection and benefits provided by your [Lumbermen's] policy will remain intact." The notice included a "new Reserve Life policy number" and an ID card with Reserve's name on it.

A "Certificate of Assumption" was included "to be attached to and form a part of the [Lumbermen's] policy." The "Certificate of Assumption" stated:

> [Reserve] hereby assumes as its own, direct obligation for the following numbered Policy * * * heretofore issued or assumed by [Lumbermen's], as provided in an Agreement executed by said companies. [Reserve] continues said Policy in force as a Policy of [Reserve].
>
> All premiums now or hereafter due on said Policy are payable to [Reserve]. Subsequent premium payments made to [Reserve] shall release [Lumbermen's] from any and all liability under the Policy * * *.

From 1987 to 1990, the Eplands made premium payments to Reserve. The Eplands never received a new or updated policy from Reserve.

In September 1989, Reserve hired the Tillinghast company to "develop estimates of the economic values of [Reserve's] individual * * * health insurance [policies] * * * in the event that [they might be] sold, in whole or in part." On February 20, 1990, Reserve produced a "Confidential Offering Memorandum" of its "Individual Accident and Health Insurance Business." In this memo, Reserve decided to "exit certain insurance operations [by] sell[ing] its individual accident and health insurance business." Reserve "propose[d] to enter into an asset purchase agreement for the sale of indemnity and reinsurance agreements" with National Financial Insurance Company (National). The memo stated that "[a]fter the assumption date, the Buyer [National] will renew [the] policies on its own behalf." The memo also noted the effect of Reserve's 1987 "acquisition" of Lumbermen's policies on Reserve's financial status.

On May 7, 1990, Reserve and National entered into an "Insurance Acquisition Agreement." The agreement stated:

> On the Assumption Date, [National] will be the successor to [Reserve] under the Policies. As of the Assumption Date, the Policies will be direct obligations of [National], and [Reserve] will have no further obligations to the policyholders under the Policies. As of the Assumption Date, [National] will substitute itself in the place of [Reserve] as if named in the place of [Reserve]. The Insureds * * * under the Policies will thereafter disregard [Reserve] as a party to the Policies and treat [National] as if it had been originally obligated under the Policies. * * * After the Assumption Date, the Insureds will have

> the right to file claims arising under the Policies directly with [National].

After National acquired Reserve's policies, it informed the Eplands that their policy with Reserve had been "reinsured and assumed" by National, effective July 31, 1990. The National notice stated that "there are no changes in your policy" and included an ID card with National's name on it. National also included a "Notice and Certification of Assumption" which stated that

> pursuant to the terms of an Assumption Reinsurance Agreement, [the policy] issued by [Reserve] [was] assumptively reinsured by [National].
>
> All of the terms and conditions of the Policy remain unchanged, except that [National] is now the insurer. All premium payments, notices, claims, or actions on the Policy will hereafter be made directly to [National] as though it had issued the Policy originally.

The Eplands' first premium was due to National on February 20, 1991. The Eplands never received a new or updated policy from National.

After receiving the notice, the Eplands contacted National to get the name of an insurance agent because the Eplands were dissatisfied with their insurance coverage and the financial weakness of National.[1] The Eplands were concerned about home nursing care, which the policy did not cover, and National's $500 increase of their premiums.

National gave the Eplands the name of insurance agent William Meade of Meade Insurance Agency Associated Inc.

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[1] At the time, National was a "C" rated insurance company by Best Insurance Reports.

In August 1990, the Eplands asked Meade to find new insurance coverage that included home nursing care. The Eplands sent Meade money for premium payments to be included with the new insurance applications. The Eplands, through Meade, filed applications and premiums with Medico Life Insurance Company (Medico), but were denied coverage in early December 1990, because they were over 80 years old. An application and premium for Medico home care was submitted on January 31, 1991, and policies were issued March 11, 1991. The Eplands, however, canceled the Medico policies sometime thereafter. On March 13, 1991, the Eplands, through Meade, filed applications and premiums for home nursing care policies with Continental Casualty Company (CNA) and Wisconsin Insurance World (Wisconsin). On April 29, 1991, both insurance companies rejected the Eplands.

During this time, Meade told the Eplands he could use the premium proceeds "to keep [the policy with National] in force while attempting to obtain the type of coverage they were looking for." In an undated, handwritten letter, Meade told the Eplands to [b]e sure not to pay any premium on Lumbermen or National Financial--hold your notice until I get there!" In a letter dated March 11, 1991, Meade stated:

> We are awaiting the issue of CNA nursing home policy and will keep you informed--please use enclosed envelope to send me your premium notice for the old Kemper Lumbermen (National Financial) nursing Home policy so I can keep for my records.

The Eplands never sent Meade the notice. Meade stated, however, that the Eplands told him they were not going to renew the policy with National. On March 28, 1991, National notified the Eplands that the policy had lapsed.

Bernie Epland died April 21, 1991. Glennie Epland lived in a nursing home from October 1992, until her death on October 14, 1994. Glennie Epland accumulated more than $38,950 in nursing home costs.

Dale Epland, the Eplands' son and attorney-in-fact, brought an action against Meade, Medico, CNA, Wisconsin, Lumbermen's, Reserve, and National to determine who was liable to pay for Glennie Epland's nursing home costs.[2] The Eplands made various claims against Meade, including that Meade breached his fiduciary duty by not making the premium payment to National to keep the Eplands' insurance in force. The Eplands entered into a stipulated dismissal with Meade on August 3, 1995, for $25,000. Meade's insurance license was also suspended for 90 days upon a Consent Order that charged Meade with submitting applications for coverage not available to the Eplands, holding the Eplands' funds without providing a monthly itemized statement, and failing to deliver or mail the Eplands' funds within 10 business days.

The Eplands sued Lumbermen's, Reserve, and National (respondent insurance companies) claiming that their policy with any or all of them was in force to cover the nursing home costs. The Eplands argue that the transfers of their policy from Lumbermen's to Reserve to National were novations that required their independent consent in order to be effective. The Eplands claimed they never consented to these transfers.

Respondent insurance companies argue that the agreements between Lumbermen's, Reserve, and National were all delegations of duties or assignments of rights and not novations requiring the Eplands' consent. Respondent insurance companies argue the Eplands could have filed a claim against any or all of them except that they allowed their policy to lapse by failing to pay their premium to National.

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[2] Medico, CNA, and Wisconsin were subsequently dismissed from the suit.

The district court granted respondent insurance companies summary judgment, stating that

> [a]n obligor on a contract is free to enter into contracts with third parties whereby the third party agrees to perform for the obligor the duties the obligor is required by the main contract to perform. Such an arrangement, subject to exceptions not applicable in this instance, can occur without the permission of the obligee to whom the performance is owed. * * * While such an arrangement relieves the original obligor of its duties only if the obligee agrees to the arrangement, the arrangement itself is legal and not a breach of the underlying contract.

The court concluded that the Eplands "by their own conduct, agreed to the substitution of obligors" by continuing to pay premiums to first Reserve and then National. The court then held that the Eplands "terminated the contract [with National] by their own volition." The court stated:

> Until the Eplands decided not to pay the premium they "had the benefit of their bargain," that is, if they had paid the premium their bills would have been paid by one, two or all of these insurance companies.

The court held that the failure to pay rendered the other alleged statutory violation issues moot. The Eplands appeal.

ISSUES

1. Did the district court err in determining the agreements between Lumbermen's, Reserve, and National were delegations of duties instead of novations, which would require the Eplands' consent?

2. Did the district court err in deciding there was no insurance in force at the time in question because the Eplands did not pay the premium to National?

ANALYSIS

"The construction and effect of a contract are questions of law." Turner v. Alpha Phi Sorority House, 276 N.W. 2d 63, 66 (Minn. 1979). Where the intention of the parties is totally certain from the writing, construction is for the court. Hunt v. IBM Mid America Employees Fed. Credit Union, 384 N.W.2d 853, 856 (Minn. 1986). "Insurance coverage issues are questions of law." State Farm Ins. Cos. v. Seefeld, 481 N.W.2d 62, 64 (Minn. 1992). A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984)

1. The Eplands, argue that Lumbermen's entered into an assumption agreement with Reserve, and then Reserve with National, thereby creating novations requiring the Eplands' consent. We agree. Where an insurance company (the insurer) sells to another (the reinsurer) the insurer's risks along with the premiums, it is called a "reinsurance agreement." The liability of the reinsurer is only to the insurer, to indemnify it for loss it may incur. The insurer still retains all contact with the original insured. 13A John A. Appleman & Jean Appleman, Insurance Law and Practice § 7681, at 480-81 (1976). Generally, the insured is not notified of the reinsurance, has no contact with the reinsurer, is not a party to the contract, and has no legal interest in the reinsurance agreement. Id. at 481.[3]

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[3] Respondent insurance companies argue the agreements were merely delegations of duties or an assignment of rights not requiring consent of the policyholders. We disagree. We note that

In contrast, when an insurance company assumes direct liability to the original insured from the original insurer, it is called a "substituted insurance" or "assumption agreement." 13A id., § 7741, at 596-97. In such a transaction, the insurance risk and obligation are transferred to the other insurer. 13A id. at 596. In creating an assumption agreement, however, the insurer may not transfer its liability to another company and compel its policyholders to accept the new company as their insurer without the policyholder's consent. 13A id., at 652-53. The policyholder may elect to repudiate or accept the assumption agreement. 13A id. at 653. Although an assumption agreement is not binding on policyholders, they are bound by its terms once they consent to it. 13A id. at 655. Thus, the original insurer is not released from its obligation on the policy unless the insured consents to the subsitution of the original insurer.

Minnesota law is in agreement:

> Reinsurance is a mere contract of indemnity, in which an insurer reinsures risks in another company. In such a contract the policy holders have no concern, are not the parties for whose benefit the contract of reinsurance is made, and they cannot,

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> parties to bilateral contracts frequently attempt to effect the substitution of the liability of a new party for that of one of the original parties, and frequently call such an attempted transaction an assignment.
>
> By whatever name the parties may call the transaction, if it is made clear that the so-called assignor intends by the transaction to be free from all further liability, it seems that acceptance by the other party to the contract of any subsequent performance from the socalled assignee, would amount to assent to a proposed novation, and the so-called assignor would be discharged from further liability.

3 Samuel Williston, Williston on Contracts § 420, at 117-18 (3d ed. 1960) (footnotes omitted).

> therefore, sue thereon. * * * Unless there was a substitution of debtors, in the nature of a novation, between the three parties, upon [which the insured's] consent to the new agreement [is required].

Barnes v. Hekla Fire Ins. Co., 56 Minn. 38, 57 N.W. 314 (1893); see also Albany Roller Mills v. Northern United Feeds & Seeds, 397 N.W.2d 430, 433 (Minn. App. 1986).

> A novation is a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty.

Restatement (Second) of Contracts § 280 (1981).

> A simple novation involving a substitution of obligors results when * * * a third person promises an obligor to assume, immediately and in substitution for the obligor's duty, a duty to the obligee to render the performance that was due from the obligor or some other performance, and the obligee agrees with the obligor or with the third person to that substitution. The third person then comes under a new duty to the obligee, who is an intended beneficiary of his promise to assume * * *, and this is consideration for the obligee's agreement to discharge the original obligor. * * * However, a mere promise by a third party to assume the obligor's duty, not offered in substitution for that duty, does not result in a novation, and the new duty that the third party may owe to the obligee as an intended beneficiary is in addition to and not in substitution for the obligor's original duty. For a novation to take place, the obligee must assent to the discharge of the

> obligor's duty in consideration for the promise of the third party to undertake that duty.

Id. § 280, cmt. d. Minnesota law is in agreement with this definition. See Albany Roller Mills, 397 N.W.2d at 433 (novation extinguishes original obligation against original obligor and shifts the debt, by mutual agreement, to a new party, and requires both consent of the obligee and consideration).

A novation is never presumed, and the party asserting it has the burden of proving its essential elements. First & Am. Nat'l Bank v. Whiteside, 207 Minn. 537, 545, 292 N.W. 770, 775 (1940). There are four elements to a novation:

> (1) there must be an existing valid contract; (2) all parties, must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid.

United Fire Ins. Co. v. McClelland, 780 P.2d 193, 195 (Nev. 1989). The controlling element is the intention of the parties, and unless there is a clear and definite intention on the part of all concerned to extinguish the old obligation by substituting the new insurer, then a novation is not effected. See Tony & Leo, Inc. v. United States Fidelity & Guar. Co., 281 N.W.2d 862, 865 (Minn. 1979) (party asserting novation must show that other party consented to novation).

In this case, we find as a matter of law that the agreements executed between respondent insurance companies were for "substituted insurance" or "assumption" agreements, which required the Eplands' consent. Under each contract, Reserve and then National, agreed to assume all liabilities and to notify policyholders by mailing "Assumption Certificates."

The Eplands received assumption certificates that indicated Lumbermen's and Reserve would be released from all liability. The Tillinghast report and Reserve's Offering Memo show that Reserve wanted to "exit certain insurance operations" by selling the policies. The Offering Memo also shows that Reserve purchased the policies from Lumbermen's in 1987. The evidence in the record clearly supports the conclusion that Lumbermen's and Reserve structured the agreements to remove any remaining liability. Thus, the assumption agreements between the respondent insurance companies were not effective against the Eplands absent proof that the Eplands consented to the substitution.

Unless Lumbermen's can establish that the Eplands consented to the substitution of Reserve, the agreement between Lumbermen's and Reserve cannot be construed to relieve Lumbermen's from its obligation of the Eplands' nursing home care coverage. If Lumbermen's can prove the Eplands consented, Reserve still bears the burden of proving the Eplands agreed to the substitution of National.

2. The record shows that respondent insurance companies did not acquire the Eplands' written or oral consent. Consent, however, can be implied from circumstantial evidence, such as the insured's subsequent conduct. Zieve v. Holstad Coffee Co., 198 Minn. 580, 584-85, 270 N.W. 581, 583 (1936). The Eplands argue that it is for a jury to determine whether they "agreed to the substitution of obligors" by continuing to pay premiums to Reserve. We agree.

Whether the Eplands consented to the novation between Lumbermen's and Reserve is a fact issue for the jury.[4] See id. If the jury determines the Eplands did not

[4] We note that whether the Eplands ever really consented is highly suspect. Respondent insurance companies never sought or allowed for the Eplands' consent. They completed the sale of the policies and then informed the Eplands they had new insurers. As far as the Eplands knew,

consent, then the Eplands' claim is against Lumbermen's, the original obligor, for breach of contract. See 3 Samuel Williston, Williston on Contracts § 420, at 117-19 (3d ed. 1960) (failure to obtain consent results in breach of contract between original obligor and obligee).

If the jury determines the Eplands consented to the novation between Lumbermen's and Reserve, then it must also determine whether the Eplands consented to the novation between Reserve and National. If not, then the Eplands' claim is against Reserve.

3. If the jury determines the Eplands consented to the novation between Reserve and National, then the jury must determine whether the alleged negligence of Meade was the reason the Eplands' policy with National lapsed. National argues that the settlement with Meade bars any claim the Eplands have against it based on Meade's conduct. See Reedon of Faribault v. Fidelity & Guaranty Ins. Underwriters, 418 N.W.2d 488, 490 (Minn. 1988) (Pierringer release of insurer's agent released insurer from vicarious liability). We disagree.

The Eplands' settlement with Meade has no effect on its claims against National. See Gronquist v. Olson, 242 Minn. 119, 125-26, 64 N.W.2d 159, 164 (1954) (injured party can still pursue remaining tortfeasors, even if claims based on same acts or circumstances, where injured party released one joint tortfeasor with no intention to release others). The Eplands sued National for National's separate coverage. If Meade's acts have anything to do with whether the Eplands

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they had only one choice--pay the premiums or lose coverage. See Security Benefit Life Ins. Co. v. Federal Deposit Ins. Corp., 804 F.Supp. 217, 227-28 (D. Kan. 1992) (mere notice to the insured and mere acquiescence to an assumption is not consent to a novation); see also Prucha v. Guarantee Reserve Life Ins. Co., 358 So. 2d 1155, 1157 (Fla. Dist. Ct. App. 1978) (refusing to imply consent where insured had no opportunity not to consent), cert. denied (Fla. Apr. 16, 1979).

had coverage with National, then Meade's actions are relevant to their case. It is for the jury to decide whether Meade was an agent of National. If so, then the jury must also decide whether Meade's alleged negligence was the cause of the Eplands' lapse.

4. Respondent insurance companies argue that even if this court decides the district court erred on the previous issues, summary judgment should still be granted on the statutory claims. We decline to address the statutory claims because the district court did not analyze them and there are disputed fact issues. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988)

DECISION

The district court erred in dismissing the Eplands' claims for insurance coverage from the respondent insurance companies. The assumption agreements between respondent insurance companies were novations as a matter of law that required the Eplands' consent. A jury must decide whether the Eplands' continued payment of premiums to Reserve and National was consent to the novations. If the Eplands did consent, a jury must then decide whether Meade was an agent for National and whether his negligence caused the Eplands' policy to lapse.

Reversed.

s/Martin R. Mansur
3/15/96

564 NW 2d. 203

STATE OF MINNESOTA

IN SUPREME COURT

C5-95-1519

Court of Appeals — Gardebring, J.

Glennie I. Epland and Dale L. Epland,
her attorney in fact,

Respondents,

vs.

Filed: April 10, 1997
Office of Appellate Courts

Meade Insurance Agency
Associates, Inc., et al.,

Respondents,

Lumbermens Mutual Casualty
Company, petitioner,

Appellant,

Reserve Life Insurance Company,
petitioner,

Appellant,

National Financial Insurance
Company, petitioner,

Appellant.

SYLLABUS

1. The consent of the insured is not necessary to effectuate an assumption agreement between two insurance companies. Failure to obtain such consent results only in the first insurer remaining liable on the insurance contract and does not constitute a breach of the contract.

2. The plaintiffs' claims for misrepresentation, for violation of statutes regulating long-term care policies, for deceptive trade practices against senior citizens, and for antitrust violations, all must fail as a matter of law and were therefore properly dismissed.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

This case asks us to consider the effect of an assumption agreement between two insurance companies. An assumption agreement is an agreement that transfers the risks of one insurer to a second insurer; the second insurer assumes direct liability to the insured.[1] Specifically, the issue before us is

[1] These agreements are also frequently referred to as "reinsurance," but we choose the term "assumption agreement" to be consistent with recent legislation on this subject, *see* Minn. Stat. § 60A.09, subd. 4a (1996), and to avoid confusion with more traditional notions of reinsurance. The term "reinsurance" generally refers to an indemnity agreement whereby an insurer secures itself against excessive loss upon a certain risk, with no direct benefit to the insured. *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, 40, 57 N.W. 314, 314 (1893); John A. Appleman and Jean Appleman, *Insurance Law and Practice*, § 7741 at 596. The type of transaction at issue in this case is different from typical reinsurance in that the risk itself is shifted to the second insurer, and the second insurer assumes direct liability to the insured. *Barnes*, 56 Minn. at 40, 57 N.W. at

whether the consent of the insured is necessary to effectuate such an assumption agreement between two insurance companies and what consequence, if any, results from failure to obtain that consent. We hold that such consent is necessary only to release the first insurer from liability under the insurance contract and that lack of consent does not invalidate the assumption agreement nor constitute a breach of the insurance contract.

The insureds in this case were Glennie and Bernie Epland, who are both now deceased. In 1979, the Eplands purchased from Lumbermens Mutual Casualty Company a medical insurance policy, to which certain nursing home benefits were added in 1981. The insurance contract specifically provided that the policy was guaranteed renewable for life, subject only to premium changes. In 1987, that policy was assumed by Reserve Life Insurance Company. Reserve sent a notice to the Eplands, telling them of the assumption, assuring them that their coverage remained the same, and instructing them to send their premium payments to Reserve. The notice included a statement indicating that by sending payments to Reserve, the Eplands would be consenting to release Lumbermens from any liability on the policy. The Eplands sent their premium payments to Reserve and chose to renew the policy when it came up for renewal.

In July 1990, the policy was again assumed, this time by National Financial Insurance Company. National sent a notice to the Eplands advising them of the assumption; as in the earlier case, the notice stated that there were no changes in the terms and conditions of the Eplands' policy. This time, however, after receiving this notice, the Eplands decided to seek insurance elsewhere. They contacted National to obtain a referral for an agent, and National referred them to William

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314; Appleman, *supra*, § 7741 at 596-97. Assumption agreements have been recognized in Minnesota since at least 1893. *See Barnes*, 56 Minn. at 41, 57 N.W. at 314.

D. Meade. Through Meade, the Eplands began seeking new insurance and allowed their policy with National to lapse by failing to pay the premiums. They were unable to obtain replacement insurance, however, due in part to their age--they were both over 80 years old in 1990. Bernie Epland died in 1991 and Glennie Epland entered a nursing home in 1992.

Glennie Epland and her son Dale Epland brought this action against Lumbermens, Reserve, National, William Meade, and Meade Insurance Agency in 1993, generally seeking payment for Glennie Epland's nursing home costs and other related damages.[2] Their complaint alleged that (1) Lumbermens and Reserve breached the insurance contract by unilaterally substituting a new party without the insureds' consent and (2) that Lumbermens, Reserve, and National misrepresented the validity of the assumption agreements. In addition, the complaint raised three statutory claims against the insurers: that Lumbermens, Reserve, and National violated the terms of a statute regulating long-term care insurance, Minn. Stat. § 62A.48 (1992); that Lumbermens, National, and Reserve committed a deceptive trade practice against senior citizens by representing that National was licensed to do business in Minnesota when it allegedly was not, Minn. Stat. § 325D.44 (1996) and Minn. Stat. § 325F.71 (1992); and that Lumbermens and Reserve violated antitrust statutes by refusing to deal with the Eplands, Minn. Stat. § 325D.53, subd. 1(3) (1996). There was also a claim against William Meade and Meade Insurance Agency, alleging that William Meade breached his fiduciary duty by counselling the Eplands not to pay the National premiums while they were seeking coverage elsewhere.

The trial court granted a motion for summary judgment in favor of Lumbermens, Reserve, and National, holding that the assumption agreements did not breach the insurance contract,

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[2] Glennie Epland died in 1994.

that the Eplands consented to the assumption by Reserve, and that the Eplands allowed the National policy to lapse voluntarily. The court also concluded that the remaining claims were rendered moot by the lapse. Further, the trial court held that Meade was not acting as an agent for any of the insurance companies.[3]

The court of appeals reversed the trial court and held that the consent of the insureds was necessary to give effect to the assumption agreements and that the question of whether there was, in fact, consent was a question of fact for the jury. *Epland v. Meade Ins. Agency Associates, Inc.*, 545 N.W.2d 401, 407 (Minn. App. 1996). If the jury were to find that there was no consent, the court held, then the Eplands would have a claim for breach of contract. *Id.* at 407-08. The court also held that the settlement with Meade had no effect on the claims against National and that whether Meade was acting as an agent for National was also a question of fact for the jury. *Id.* at 408. Finally, the court declined to address the Eplands' statutory claims because the district court did not address them and the court of appeals determined that there were disputed issues of fact relative to their resolution. *Id.* We reverse.

On appeal from summary judgment, we must ask whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

In their complaint, the Eplands claim that Lumbermens and Reserve breached the insurance contract by unilaterally substituting new parties to the contract without the Eplands' consent. At oral argument, counsel for the Eplands argued more specifically that the assumption agreements were a breach of the "guaranteed renewable for life" term of the

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[3] The Eplands reached a settlement with William Meade and Meade Insurance Agency and subsequently dismissed all claims against them.

contract. By delegating the duty to renew to another insurer, the Eplands assert, first Lumbermens and then Reserve failed to fulfill its duty to renew and therefore violated this term of the contract.[4] We disagree.

Insurance policies are contracts, and, unless there are statutory laws to the contrary, general principles of contract law apply. *Waseca Mut. Ins. Co. v. Noska,* 331 N.W.2d 917, 926 (Minn. 1983). As a general rule, a party to a contract may assign all beneficial rights to another, without the consent of the other party to the contract.[5] 3 Williston on Contracts § 411, at 13-18 (3d ed. 1960). In the absence of an express agreement to the contrary, a party may also delegate his or her duty to perform under a contract, *id.* at 20, but the original party remains liable if the performance is substantially different than performance by the original party. *Id.; see also Tony and Leo, Inc. v. U.S. Fidelity and Guar. Co.,* 281 N.W.2d 862, 865 (Minn. 1979); *State v. Wood,* 173 Minn. 406, 409, 217 N.W. 360, 361 (1928). A party may not divest itself of liability on a contract without the consent of the other

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[4] The Eplands also seem to argue that because they relied on reports of Lumbermens' strong financial status in choosing Lumbermens as their insurer, Lumbermens' financial stability became an implicit term of their insurance contract. Reserve's financial rating was slightly lower than Lumbermens', and National's was significantly lower. By transferring their policy to insurers with less financial stability, the Eplands argue, Lumbermens breached this implicit term of the contract.

This argument has merit only insofar as the obligation to pay a claim when made is a term of the contract, and it is expected that the party obligated to make this payment will have the financial ability to do so when the time for performance comes. Because the Eplands allowed their policy to lapse before they ever made a claim under the policy, they suffered no actual injury based on the lower financial rating of National. Had they made a claim on the policy, and had National not paid the claim because it was financially incapable of doing so, the Eplands could then have asserted such a claim, although we make no comment on its merits.

[5] Although there are some exceptions to this general rule, none of them are relevant here.

party to the contract. Williston, *supra*, § 411 at 19; *Tony and Leo*, 281 N.W.2d at 865. If the other party consents to the delegation of duties, thus completely substituting one party for another, the proper term for the transaction is a "novation." Williston, *supra*, § 420 at 117; *see also Tony and Leo*, 281 N.W.2d at 865.

To have an effective novation of an insurance contract, all parties must agree. *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, 41, 57 N.W. 314, 314 (1893). The consent to release an original party from its liability under the contract must "distinctly appear, from the express terms of the agreement, or as a necessary inference from the situation of the parties, and the special circumstances of the case * * *." *Id.* at 42, 57 N.W. at 315. Consistent with the determination of the trial court, we hold that, as a matter of law, the Eplands consented to the Lumbermens/Reserve assumption agreement by payment of premiums to Reserve, thus releasing Lumbermens from its obligation under the policy.

However, the absence of such consent does not render either of the assumption agreements at issue invalid and does not constitute a breach of the underlying insurance contract. The consent of the Eplands was necessary not to effectuate the assumption, but only to relieve the first insurer from liability on the insurance contract.[6] The policy's "lifetime renewal"

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[6] A similar approach has been adopted by the legislature, but only after the critical events in this case had taken place. In 1991, the legislature enacted a statute regulating assumption agreements for life insurance and recently expanded that regulation to include all types of insurance. Act of June 3, 1991, ch. 325, Art. 20, 1991 Minn. Laws 2340 (1991); Act of April 11, 1996, ch. 446, art. 1, § 2, 1996 Minn. Laws 1206 (1996). As amended, Minn. Stat. § 60A.09, subd. 4a, requires insurance companies entering into assumption agreements to file with and obtain approval from the Commissioner of Commerce. The assumption agreement must specifically provide that the original insurer remains liable to the insured in the event the assuming insurer is unable to fulfill its obligations. The assumption notice to the insured must include specific language notifying the insured that the first company remains liable on the policy:

obligation was not wiped out by the assumption agreement; it was merely transferred to another insurance company, with only the continuing obligation of the first insurer dependent on the consent of the other contracting party, the Eplands. *See Barnes,* 56 Minn. at 41, 57 N.W. at 314 (holding that insured who had not consented to substituted insurance arrangement could maintain action against first insurer for coverage under her insurance policy); *Maddy v. National Life Ins. Co.,* 156 Minn. 375, 379, 194 N.W. 880, 881 (1923) (holding that insured could maintain action against either insurer for coverage under policy, when novation was ineffective due to lack of consent by first insurer). Here, there was no claim that any of the three companies failed to renew the policy; indeed, the Eplands themselves allowed the policy to lapse by failing to pay the necessary premiums to National. We therefore conclude that the trial court properly granted summary judgment on the breach of contract claim.[7]

> Policyholder: Please be advised that you retain all rights with respect to your policy against your original insurer in the event the assuming insurer is unable to fulfill its obligations. In such event, your original insurer remains liable to you notwithstanding the terms of its assumption agreement.

Minn. Stat. § 60A.09, subd. 4a (1996). The first company may be released from liability only if the insured consents in a signed writing to a release of the first company, and if the insured has been "informed in writing by the insurer of the circumstances relating to and the effect of the assumption * * *." *Id.* This signed writing must also be filed and approved by the commissioner. *Id.*

[7] The court of appeals also held that it was a question of fact for the jury whether William Meade was in fact acting as an agent of National. This issue was not raised before the court of appeals nor is it relevant to the outcome of this case. The Eplands sued William Meade, Meade Insurance Agency, and the three insurance companies, but nowhere in their complaint do they state any claims against the insurance companies that are based on the companies' vicarious liability for the actions of William Meade. The Eplands have already settled their claims with Meade and Meade Insurance Agency, and the claims against them were dismissed. While it is true that the release of Meade and Meade Insurance Agency

We must also consider the remaining counts in the complaint. These remaining claims are for misrepresentation, violation of the long-term care regulatory statute, deceptive trade practices, and antitrust violations. The trial court summarily dismissed these claims as "moot" because the policy had lapsed. The court of appeals reversed, finding that there were disputed issues of fact on these remaining issues. We conclude that these claims were not rendered moot by the lapse because none of them depends on the existence of a contract, but affirm their dismissal on other grounds.[8]

The Eplands' misrepresentation claims allege that the defendant insurance companies misrepresented the "fact that the parties to the contract had not been changed" and "the law of contract with respect to such modifications." Although the statement of these claims is somewhat vague, it appears that the alleged misrepresentations were, first, that Reserve, and then National, represented that it was, as a result of the assumption agreement, now the insurer under the policy, when in fact it was not; and, second, that the insurers represented that the assumption agreements were legal and valid, when in fact they were not. Because we hold that the assumption agreements were valid delegations of duties and assignments of rights, not in breach of the contract, there was simply no misrepresentation. Specifically, it was true that Reserve, and then National, were indeed the insurers under

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was a *Pierringer* release, that is, it reserved the balance of the cause of action against the nonsettling defendants, *Reedon of Faribault, Inc. v. Fidelity and Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488, 490 (Minn. 1988), there were no causes of action against the insurance companies arising from William Meade's actions to be preserved in this case. Thus, while William Meade's agency status remains unresolved, the resolution of that fact question is simply not relevant to the outcome of the issues before us.

[8] As a general rule, we prefer not to reverse a correct decision simply because it was based on the wrong theory. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 728 (Minn. 1990).

the contract, although Lumbermens and then Reserve may have also remained liable; and it was true that the assumption agreements were valid and legal. The claims as to misrepresentation must therefore fail.

The Eplands' statutory claims must also fail because they have not alleged any injuries arising from the alleged statutory violations. First, they claim that the defendant insurance companies violated Minn. Stat. § 62A.48, a regulatory statute governing long-term care policies, but do not allege that they suffered any injury as a result of the alleged violations. To have standing to bring a claim, a person must have suffered some injury in fact as a result of the alleged actions. *Snyder's Drug Stores, Inc. v. State Board of Pharmacy,* 301 Minn. 28, 32, 221 N.W.2d 162, 165 (1974). Because the Eplands have not alleged any injury, they do not have standing to bring this claim. In addition, the only remedy the Eplands seek for this claim is reinstatement of their insurance policy. There is nothing in this regulatory statute authorizing such a remedy. *See* Minn. Stat. § 62A.48. Accordingly, summary judgment was properly granted on this claim.

Secondly, the Eplands allege the defendant insurance companies committed a deceptive trade practice against senior citizens, in violation of Minn. Stat. §§ 325D.44 and 325F.71. The alleged deception was that Reserve and National, through their actions, represented that National was qualified to do business in Minnesota, when National was allegedly not qualified. Again, to have standing to sue, one must have suffered an injury. *See Snyder's,* 301 Minn. at 32, 221 N.W.2d at 165. The Eplands have not alleged any injury, nor could they. At the time they brought this claim, the Eplands were not in a position to be injured by the alleged deception because they did not own a policy issued by National: thus there was no danger that they would rely upon the alleged misrepresentation. Indeed, by the time the claim was brought in 1993, the Eplands' policy had lapsed for three years.

Therefore, they do not have standing to sue for any alleged deceptive trade practice.

Finally, as for the Eplands' antitrust claim, they claim that the defendant insurance companies refused to deal with the Eplands, in violation of Minn. Stat. § 325D.53, subd. 1(3). While Minnesota's antitrust statute creates a broader grant of standing than the traditional common law rule, it still requires a person to have suffered *some* injury, either direct or indirect. Minn. Stat. § 325D.57; *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 495-96 (Minn. 1996). The Eplands have not alleged *any* injury, direct or indirect, arising from the alleged antitrust violation. Accordingly, they do not have standing to raise that claim, and summary judgment was properly granted on this issue.

In summary, we hold that consent of the insured is not necessary to effectuate an assumption agreement between two insurance companies. Failure to obtain consent results only in the first insurer remaining liable on the contract and does not constitute a breach of the contract. Summary judgment was therefore properly granted on the Eplands' breach of contract claim. Second, we hold that the Eplands' remaining claims for misrepresentation, for violation of statutes regulating long-term care policies, for deceptive trade practices against senior citizens, and for antitrust violations, all must fail as a matter of law and were therefore properly dismissed on summary judgment.

Reversed.

STATE OF MINNESOTA

IN SUPREME COURT

C5-95-1519

Glennie I. Epland and Dale L. Epland,
her attorney in fact,

Respondents,

vs.

Meade Insurance Agency Associates, Inc., et al.,

Respondents,

Lumbermens Mutual Casualty Company, petitioner,

Appellant,

Reserve Life Insurance Company, petitioner,

Appellant,

National Financial Insurance Company, petitioner,

Appellant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for rehearing in the above entitled matter be, and the same is, denied.

Dated:
12 May 1997

BY THE COURT:

s/Sandra Gardebring
Associate Justice

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Glennie I. Epland and Dale L. Epland, her attorney in fact, Plaintiffs	File No. 93-19775 Type of Case: Agency Insurance
v.	
Meade Insurance Agency Associates Inc., William D. Meade, Lumbermen's Mutual Casualty Insurance Company, Reserve Life Insurance Company National Financial Insurance Company, Defendants	AFFIDAVIT OF ANDREW F. WHITMAN

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Andrew F. Whitman, being duly sworn on oath deposes and says:

1. That I have been retained by the attorneys for the Plaintiff in this matter to provide expert advice and testimony on a variety of issues pertinent to this case. A copy of my resume is attached to this affidavit.

2. That I am a Professor of Insurance in the University of Minnesota's Graduate School of Management, have taught insurance law at the University of Minnesota Law School, have taught courses which include topics of insurance industry underwriting and marketing practices, have

experience as a consultant to governmental, private and non-profit entities on insurance and risk management practices, have served as Deputy Insurance Commissioner and Acting Chief Counsel for the Commonwealth of Pennsylvania and an expert witness in over 100 insurance-related cases, including court testimony in the states of California, Colorado, Iowa, Minnesota, New Mexico, New Jersey, South Dakota and Wisconsin. My current resume is attached.

3. That I reviewed the following listed pleadings and documents in connection with this case, and have consulted with attorneys for the Plaintiff at great length about the facts and circumstances in this matter. I am very familiar with the issues involved in this litigation and the positions put forth by all parties.

-Findings of Fact, Conclusion of Law & Order
-Affidavit of John F. Beukema
-Second Supplemental Memorandum
-Memorandum of Lumbermen's Mut., Reserve Life & Nat'l Financial in Reply to Plaintiff's Second Supplemental Memorandum
-Third Supplemental Memorandum
-Response to Defendant Insurers to Plaintiff's Third Supplemental Memorandum
-Best's Reports for 1978, 1981, 1987, 1990 on: Lumbermen's Mut. Cas. Co. Reserve Life Ins. Co., Nat'l Financial Ins. Co.
-Summary data compiled by S&P re above insurers
-Report prepared by TX Dept. of Ins. following 1990 yr.end audit of Nat'l Financial
-Reserve Life individual health in-force appraisal of 9/30/89, Tillinghast
-Insurance acquisition agreement between Reserve Life & Nat'l Financial, 7/2/90
-Individual A & H insurance business of Reserve Life

-Confidential offering memo, Alex Brown & Sons, Inc. 2/20/90

-Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment

4. I have, in the course of my engagement as an expert witness to the Plaintiff, reviewed the financial condition of Lumbermen's Mutual Casualty Company (Lumbermen's), Reserve Life Insurance Company (Reserve), and National Financial Insurance Company (Nat'l Financial) at the various time frames pertinent to the issues in this litigation. I have also reviewed insurance and finance literature on the relationship of insurance policy value to the insurer's financial solidity.

5. That based upon my study of heretofore mentioned documents, transcripts of depositions, and literature, I am of the opinion that:

5.1 The transfer of business from Lumbermen's to Reserve to Nat'l Financial, resulted in a substantial reduction in the value of the insurance for the policyholders. Insurance financial and economic literature and principles explain why this reduction occurred through the attempts to substitute performance by Lumbermen's for performance by Reserve, and, ultimately, National Financial. It is a well-established principle that when a creditor/insured on a long-term contract experiences a devaluation or reduction in the investment grade of the debtor/insurer, value of the commitment to the creditor/insured is reduced. The reduction in the value of insurance of this type, when the insurer's financial status is weakened, is a relationship well-accepted by authorities in this field.

5.2 The means of measuring the lower, or weaker, financial status of insurance companies is also well-accepted, from traditional A.M. Best's ratings through National

Association of Insurance Commissioners (NAIC), Insurance Regulatory Information System (IRIS) ratios.

5.3 A lowering of an insurer's financial solidity increases the risk of performance to the insured, and results in a lower value to the policyholders. This relationship is intuitively demonstrated when insureds pay a higher premium for insurance from a financially stronger insurance company, just as a creditor bond purchaser will pay more for a bond guaranteed by the more highly-rated debtor.

5.4 The nature of this type of insurance, as a long-term contract, gives it unique properties, such as a reserve build-up in value, which other forms of short-term contracts, such as property/casualty contracts, do not have. This reserve build-up demonstrates that the policyholders value increases as they pay premiums over the years in which the policy is in force.

5.5 The NAIC has considered mandating reserve cash values for these long-term contracts, since reserve values already exist actuarially.

5.6 With this type of insurance, which Eplands purchased and paid the premiums over a long term, they definitely experience a reduction in the value of the insurance when there is an increase in risk regarding the insurers performance, and the continuation of promised performance, under the insurance contract.

Further, your affiant sayeth not.

March 2, 1995 s/s

Dated Andrew F. Whitman

Subscribed and sworn to before me
this 2nd day of March, 1995.

s/Georgene E. Draheim
Notary public
Hennepin County, Minnesota

EXCERPTS FROM
1 FLOOR STATEMENT
INTRODUCTION OF THE METZENBAUM/BRYAN
"INSURANCE POLICY TRANSFER ACT"
Circa April, 1994
(See record for entire Statement)

Mr. President, on behalf of myself and Senator Bryan, I rise to offer a bill that will put fairness back into the insurance company-policyholder relationship. "The Insurance Policy Transfer Act" prevents policyholders from being victimized when their insurance company transfers their insurance policies to another insurer -- without the policyholders' informed consent.

These policy transfers treat policyholders like commodities, trading them like baseball cards.

This is outrageous. Transfers change the policyholders contract without the consent of the policyholder. In most businesses this would be impossible, illegal, but not in the insurance industry! The insurance industry feels it has the impunity to break contracts with policyholders, when it suits insurance companies.....

It's absolutely disgraceful that the insurance industry can treat policyholders like objects, swapping and trading them without even asking their permission.

No other industry does this. Only an industry as powerful and arrogant as the insurance industry could stoop to such one-sided practices.....

According to a survey by my Antitrust Subcommittee, most state laws don't require that insurers obtain the informed consent of policyholders before a transfer.

The insurance industry's unchecked power to transfer policies causes enormous trauma and financial loss.

My Antitrust Subcommittee has documented how tens of thousands of policyholders in the past decade suffered because they were transferred by their insurance company,

*transferred without their consent,

*transferred because their original insurer decided they were no longer profitable,

*transferred to distant and little known companies,

*transferred to financially weaker insurers, insurers in such poor financial shape that they couldn't attract policyholders, but had to buy them wholesale, without their consent,

*transferred to insurers operated by unscrupulous executives looking only for the millions of dollars in assets that are transferred with policies; assets that represent years of policyholders' premiums.....

Consider the transfer of 3,000 annuities of Security Benefit Life Insurance Company of Kansas Security Benefit Life Insurance Co., v. F.D.I.C., 804 F Supp 858 DKan. 1994.) Security Benefit secretly concluded that the rate of interest it had promised the policyholders on the annuities was higher than it wanted to pay. Security Benefit figured that transferring the annuities to another insurer could get it out from under its contractual obligation.....

The annuities were transferred to the Life Assurance Company of Pennsylvania. Security Benefit was rated at the top in financial health, while Life Assurance of Pennsylvania was unrated.

The subcommittee obtained a handwritten memo by Security Benefit's chief executive officer. He wrote that he "was afraid" that Life Assurance of Pennsylvania, quote, "might go under," end quote. It went under.....

Security Benefit made its own policyholders into legal orphans, transferring them to a bankrupt insurer, to a company they had not chosen. Disgraceful!

The policyholders eventually got paid, but only after four year of uncertainty and anxiety. And only when the state insurance guaranty funds, which are overwhelmingly financed by taxpayers, picked up three quarters of the cost. The original insurer, Security Benefit, enjoying record profits, foisted its obligation off on the taxpayers, getting off easy.....

Don't assume that transfers are isolated occurrences. The reality if far from that. Based on an informal survey, the staff of the Antitrust Subcommittee estimates that tens of billions, very likely, hundreds of billions of dollars of policies have been transferred. These policies involve hundreds of thousands of policyholders. Many of whom have been transferred to risky companies. In most cases, the policyholders were not asked if they wanted to be transferred.....

Unfortunately, under existing law, there is little a policyholder can do when his or her policy is transferred without their consent. In most cases even when it's possible to sue, it's impractical. Many lawyers are reluctant to make a case against a well-funded insurance company that has the best lawyers in town. Lawyers that will take a policyholder's case, usually require thousands of dollars in legal fees in advance. Few policyholders have that kind of money to gamble on a lawsuit.

Even if policyholders win, there is little chance they can force the insurer to pay their huge legal bills.

It is no wonder few transfers are successfully challenged.....

Transfers are especially common with individual disability policies. The reason appears to be that many companies entered the disability insurance business in the late 70s and early 80s and mispriced the product. How these insurers want out from under their obligations. That is just not acceptable!

Imagine how worried, how frightened, you would be, especially if you were disabled --confined to bed, home, or wheelchair-- and forcibly transferred to a below-investment-grade insurer!....

After decades of paying premiums to their insurance company, policyholders are being disowned.

--- Their insurance company says it owes them nothing,

--- Says that after years of paying premiums their insurer has transferred them to another insurer, because they were no longer profitable! Outrageous!

I know of no industry, other than the insurance industry, that can get away with treating customers in such a shoddy manner.....

Supreme Court, U.S.
FILED
SEP 5 1997
CLERK

No. 97-262

In the

Supreme Court of the United States

October Term, 1997

Dale L. Epland, as Personal Representative
of the Estate of Glennie I. Epland, decedent,

Petitioner,

v.

Lumbermen's Mutual Casualty Company,
Reserve Life Insurance Company,
and National Financial Insurance Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MINNESOTA

SUPPLEMENTAL BRIEF FOR PETITIONER

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Dated: September 5, 1997

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In accordance with Rule 15.8, the Petition for Writ of Certiorari still pending, attention is called to new matter not available at the time of the petitioner's last filing:

1. Denial of State Supreme Court for declaration of a federal question dated August 26, 1997,

2. September 2, 1997 service of Petition For Writ of Certiorari herein upon the Attorney General for the State of Minnesota in this state's claim in Hartford Insurance Co. v. California, 509 U.S. 764.

Dated: September 5, 1997

Respectfully submitted,

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